



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY

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Douglas W. Domenech  
Secretary of Natural Resources

David K. Paylor  
Director

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### MINUTES STATE WATER CONTROL BOARD

February 4, 2011

Training Room

Department of Environmental Quality

629 East Main Street

Richmond, Virginia

#### Board Members Present:

W. Shelton Miles, III, Chair

Lou Ann Jessee Wallace

Roberta A. Kellam

Robert H. Wayland, III., Vice-Chair

Robert L. Dunn

William B. Bott

#### Board Member Absent:

William A Pruitt

#### Staff Present:

David K. Paylor, Director

Department of Environmental Quality

Cindy M. Berndt

Department of Environmental Quality

#### Attorney General's Office:

John Butcher, Special Assistant Attorney General

- 1) The attached minutes summarize activities that took place at this Board Meeting.
- 2) The meeting was convened on February 4, 2011, at 9:35 a.m., recessed at 10:55 a.m., reconvened at 11:05 a.m., recessed at 12:25 p.m., reconvened at 1:30 p.m. and adjourned at 3:00 p.m.

*Approved Minute No. 1  
April 14, 2011*



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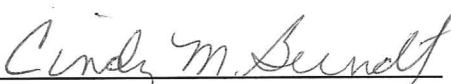
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### **EXCERPT FROM THE PROCEEDINGS OF THE STATE WATER CONTROL BOARD AT ITS MEETING ON FEBRUARY 4, 2011**

#### **MINUTE NO. 1 - Minutes**

The Board approved the Minutes from the December 9, 2010, meeting as contained in the Board book.

  
Cindy M. Berndt



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### EXCERPT FROM THE PROCEEDINGS OF THE STATE WATER CONTROL BOARD AT ITS MEETING ON February 4, 2011

#### **MINUTE NO. 2 – Draft Virginia Water Protection Permit No. 09-0892, Claytor Hydroelectric Project**

Staff presented information on the project and the proposed revisions to the draft Virginia Water Protection permit that was public noticed in June 2010. These revisions were proposed as a result of comments made by the public, local governments, and state agencies during the public participation process. The revisions included clarification of required versus optional flow releases from the project to downstream reach of the New River; addition of coordination provisions for operating the project under drought of record conditions; clarification of circumstances under which a drawdown of the lake level could occur and the protocol to be implemented; revisions to the project's operation center name; and revisions to when two monitoring reports shall be filed, based on the issuance date of a Federal Energy Regulatory Commission license. Staff also noted permit conditions that were not proposed for revision following public comment, including the maximum permit term; reducing required flow releases during February and March; revised timeframes for peaking versus levelized flow generation modes to extend the recreational season; recreational access around the dam; and including specific adaptive management protocols in the permit rather than through a collaborative process with interested stakeholders.

Four speakers commented to the Board. Mr. Frank Simms of Appalachian Power Company indicated that continuation of the annual drawdown was not requested in the Virginia Water Protection application; an annual drawdown may occur under the provisions of the Water Management Plan with appropriate approvals; the flow releases for February and March as proposed by DEQ were acceptable to the applicant, provided DEQ and DGIF support the permit values to FERC's license process; and the language on the draft cover page does not match that in Part I.B of the Special Conditions. The remaining speakers Mr. Peter Huber, Pulaski County Administrator; Ms Laura Bullard, Friends of Claytor Lake; and Ms Cheri Strenz, stakeholder, all commented on the need for the drawdown to economically conduct shoreline maintenance and stabilization activities and advocated the continuation of the drawdown as part of a permit requirement.



A revised page 7 of Attachment 1 to the Board Memo for this project was distributed to the Board. Staff noted that the first sentence of the Staff Response to Issue No. 1 was stricken as it dealt with legal matters that are not the purview of staff to comment on. Mr. Dunn asked if DEQ's policies, procedures, laws give them the authority to require a lake level drawdown. Staff responded that the authority comes from the State Water Control Law but including such a condition in the permit adds liability to the applicant for an activity that is not being requested. Mr. Butcher confirmed his request to strike a sentence from the staff response, explaining that the sentence as written, while accurate, was misleading regarding authority delegation to uphold the State Water Control Law. Mr. Butcher advised the Board that requiring the drawdown would be appropriate if the Board so concluded it was appropriate to balance and protect all beneficial uses.

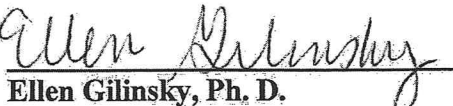
After hearing the staff recommendations to the Board, Director Paylor, asked for verification that the Department of Game and Inland Fisheries had concerns over continuing the drawdown due to impacts to a state-listed mussel species. Mr. Bill Kittrell with the Department of Game and Inland Fisheries clarified the limitations of the department's regulations and obligations regarding the "take" of a listed species.

Chairman Miles asked for concurrence from Mr. Kittrell that his department would support the flow releases for February and March for purposes of the federal license. Mr. Kittrell responded yes. Chairman Miles asked Mr. Frank Simms on what frequency he would expect to implement a drawdown if one were requested in the future, and how frequently the applicant might initiate a drawdown. Mr. Simms replied it would depend on the requestor, but that the protocol as outlined in the Water Management Plan would be followed, and that as of now, there is no planned drawdown for project maintenance, and historically such drawdowns have not occurred at Claytor.

Mr. Wayland noted that, while empathizing with landowners, he could not see a clear mandate to require the annual drawdown in the permit to further a water quality objective, and that the FERC procedure would cover requests for a drawdown. Mr. Wayland was satisfied with the permit as drafted and made a motion to approve the draft permit. Chairman Miles agreed but asked the applicant to seriously consider implementation at some level of a drawdown, within the framework of its proposed license variance process, to at least provide relief to landowners who began shoreline maintenance or stabilization projects but could not be complete such projects before elimination of the annual drawdown.

#### **Board Decision:**

The Board voted unanimously to approve the revisions to the draft Virginia Water Protection permit as proposed by DEQ staff, and authorized the DEQ Director to issue Virginia Water Protection Individual Permit Number 09-0892.

  
**Ellen Gilinsky, Ph. D.**  
**Director, Water Division**



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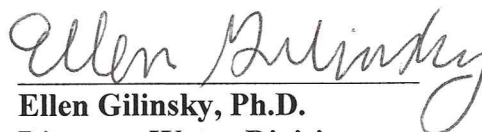
### EXCERPT FROM THE PROCEEDINGS OF THE STATE WATER CONTROL BOARD AT ITS MEETING ON FEBRUARY 4, 2011

#### MINUTE NO. 3 - General Virginia Pollutant Discharge Elimination System (VPDES) Permit for Discharges Resulting from the Application of Pesticides to Surface Waters, 9VAC25-800

The staff recommended that the board adopt the General Virginia Pollutant Discharge Elimination System (VPDES) Permit for Discharges Resulting from the Application of Pesticides to Surface Waters, 9VAC25-800. The staff also recommended that the board affirm that it will receive, consider and respond to petitions by any person at any time with respect to reconsideration or revision of this regulation, as provided by the administrative process act.

#### Board Decision

Based on the briefing material and the staff presentation, the Board voted unanimously to adopt the General VPDES Permit for Discharges Resulting from the Application of Pesticides to Surface Waters, 9VAC25-800. The Board also voted to receive, consider and respond to petitions by any person at any time with respect to reconsideration or revision of this regulation, as provided by the administrative process act.

  
Ellen Gilinsky, Ph.D.  
Director, Water Division



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### EXCERPT FROM THE PROCEEDINGS OF THE STATE WATER CONTROL BOARD AT ITS MEETING ON FEBRUARY 4, 2011

#### MINUTE NO. 4 – VPDES Consent Special Orders

Kathleen O'Connell, Water Enforcement Program Manager, presented to the Board the Consent Special Orders for the Louisa County Water Authority's Regional and Zion Crossroads Sewage Treatment Plants. Staff had received public comment regarding the Zion Consent Special Order. At the meeting several speakers spoke against or in favor of the Zion order. The speakers were:

1. David Bailey
2. Noel Harrison
3. Reginald Murphy.
4. Karen Hulebak
5. Amanda Welch
6. Joseph Rodricks
7. Rae Ely
8. Angelo LaMascalo
9. Dale Mullen

The Board approved the Orders with a 5 to 1 vote (Chairman Miles voting against and Mr. Pruitt being absent), authorized the Department's Director to execute the Orders on the Board's behalf and to refer violations of the Orders to the Office of the Attorney General for appropriate legal action.

A handwritten signature in black ink that reads "Kathleen F. O'Connell".

Kathleen F. O'Connell  
Water Enforcement Program Manager  
Division of Enforcement





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### **EXCERPT FROM THE PROCEEDINGS OF THE STATE WATER CONTROL BOARD AT ITS MEETING ON FEBRUARY 4, 2011**

#### **MINUTE NO. 5 – Public Forum**

Mr. John Martin appeared to follow up to an appearance at the December and September 2010 meetings. He requested that the board invite Mr. Frederick of the Rivanna Water and Sewer Authority to appear at a future meeting to brief the Board on issues surrounding the water supply plan for the area. Mr. Paylor advised the Board that he would contact Mr. Martin at a later date about the appropriateness of such a briefing.

Mr. Michael McEvoy of the Western Virginia Water Authority appeared to ask that consideration be given to revising the guidance on a wastewater treatment project qualifying for a zero interest loan under the Revolving Loan Fund specifically as it relates to consideration of locality specific qualifications versus regional qualifications.

A handwritten signature in cursive script that reads "Cindy M. Berndt".

**Cindy M. Berndt**



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### EXCERPT FROM THE PROCEEDINGS OF THE STATE WATER CONTROL BOARD AT ITS MEETING ON FEBRUARY 4, 2011

#### **MINUTE NO. 6      Request to Conduct a Recreational Use Attainability Analysis for Gillie Creek, City of Richmond**

Alan Pollock (DEQ Office of Water Quality Programs) made the staff presentation regarding a request from the City of Richmond to conduct a recreational Use Attainability Analysis (UAA) for Gillie Creek in the City of Richmond. The request was made in accordance with the Code of Virginia and is contained in a document, dated August, 2010, entitled "Reasonable Grounds Documentation to Conduct a Recreational Use Attainability Analysis for Gillies Creek, City of Richmond, Virginia under VAC 62.1-44.19:7" This documentation asserts that attainment of the designated recreational use Gillie Creek is not feasible because:

- primary contact is not attainable due to flow and hydrologic modification.
- the City does not believe there is a primary contact use on lower Gillie Creek.
- the City maintains that 95% reductions above the Long Term Control Plan will cause substantial and widespread economic and social impacts.

Mr. Pollock outlined for the Board that Gillie Creek is unique in that its watershed in the City is served by a combined sewer system and that the creek was channelized and lined with concrete in 1974. All property surrounding the channelized and paved section of Gillie Creek is either owned by the City, railroad companies, or industry, although a City park is nearby.

A general notice soliciting comment on the request to conduct a UAA study in Gillie Creek was published in the Virginia Register on October 1, 2010. The comment period ended on November 1, 2010. Comment was received from seven citizens, three environmental organizations, one state agency, two municipal organizations, and City of Richmond. Mr. Pollock reviewed the comments submitted. In general, citizen and environmental organizations urge the City and DEQ to implement cleanup plans prior to initiating a UAA. Comment from the City and municipal organizations stated there are reasonable grounds to conduct a UAA for Gillie Creek and that a UAA is necessary to determine the existing uses for the creek and direct resources appropriately.



Mr. Pollock reminded the Board that conducting a UAA study is not a regulatory action. After the UAA is completed, if the decision is to move forward, then any change to the standards needs to go through the regulatory process in accordance with the VA Administrative Process Act, and also be approved by EPA.

Questions from the Board regarding the nearby city park and accessibility to the paved portion of the creek were responded to by City representatives and DEQ staff. Board Chairman Shelton Miles expressed his preference of having TMDL implementation in place prior to conducting a UAA. The City representative explained the advantages in this situation to conduct the UAA concurrently with TMDL implementation. Additional questions regarding the status of the City's CSO Long Term Control Plan and pollution abatement activities in Gillie Creek were addressed by a representative from the environmental consulting firm contracted by the City. A representative for the Virginia Municipal League also spoke in support of the City's request. He stated that similar UAAs have been done in Los Angeles and used to support subsequent changes to recreational uses to temporarily suspend the primary contact for a short period after rainfall events.

Subsequent discussion clarified that the City may do a UAA study without Board approval. The Commonwealth may use the results from their UAA study as the basis for considering a water quality standards change.

### **Staff Recommendations**

Mr. Pollock then provided the Board with the staff recommendations.

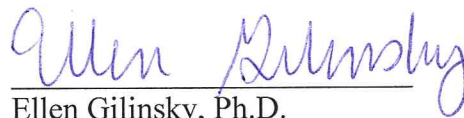
1. Subject to the condition listed below, grant approval for the City of Richmond to conduct a use attainability analysis for recreational uses in Gillie Creek according to criteria established pursuant to the Clean Water Act and in conformance with 9 VAC 25-260-10.
2. Include in the use attainability analysis a detailed examination of how any change to the recreational use in Gillie Creek would avoid impacting the primary contact recreational use of the James River adjacent to, and downstream of, the confluence with Gillie Creek.
3. Direct the staff to report back to the Board upon completion of the UAA study whether the results of the study are deemed consistent with federal and state regulations and warrant initiating a regulatory process to consider removal of the recreational use or establishing a subcategory of recreational use in Gillie Creek.

### **Board Decision**

The Board vote was evenly split three to three (Kellam, Wallace and Wayland – yes; Bott, Dunn and Miles – no) so the staff recommendations were not accepted.

The Board then considered an alternative action and voted unanimously in favor of the following:

1. Recognize that the City of Richmond can conduct a use attainability analysis for recreational uses in Gillie Creek according to criteria established pursuant to the Clean Water Act.
2. Request that the City include in the use attainability analysis a detailed examination of how any change to the recreational use in Gillie Creek would avoid impacting the primary contact recreational use of the James River adjacent to, and downstream of, the confluence with Gillie Creek.
3. Direct the staff to report back to the Board upon completion of the UAA study whether the results of the study are deemed consistent with federal and state regulations and warrant initiating a regulatory process to consider removal of the recreational use or establishing a subcategory of recreational use in Gillie Creek.



Ellen Gilinsky, Ph.D.

Director

Water Division



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### EXCERPT FROM THE PROCEEDINGS OF THE STATE WATER CONTROL BOARD AT ITS MEETING ON FEBRUARY 4, 2011

#### MINUTE NO. 7– Merck Settlement

Alan Pollock, Manager of the Office of Water Quality Programs, summarized a proposal for a settlement agreement of the appeal by the Chesapeake Bay Foundation and the Virginia State Waterman's Association regarding the Board's action in April 2009 to increase the nutrient waste load allocations for the discharge of treated wastewater into the Shenandoah River by Merck & Company, Inc., located in Rockingham County.

Mr. Pollock noted that the Board-approved increased nutrient allocations for Merck are included in the Chesapeake Bay TMDL issued by EPA in December 2010. He also reviewed the wording of the proposed settlement that would revise the "footnote" for Merck contained in 9 VAC 25-720.

Following the staff presentation, Assistant Attorney General, John Butcher, informed the Board that he had learned during the meeting that both plaintiffs had not yet given their approved of the proposed settlement. Peggy Sanner, attorney for CBF, addressed the Board to explain that she also represented the Waterman's Association in the appeal and had not yet received their approval of the settlement.

#### Decision:

The board, by unanimous vote, agreed to delay action on the settlement until a later meeting.

A handwritten signature in blue ink, reading "Ellen Gilinsky", written over a horizontal line.

Ellen Gilinsky, Ph.D.  
Director, Water Division